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JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

JAMES MALCOLM BEARDEN

Petitioner

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

M. NEIL ANDREWS
610 Fulton National Bank Bldg.
Atlanta 3, Georgia

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

NO.

JAMES MALCOLM BEARDEN

Petitioner

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 22, 1960.

OPINIONS BELOW

The District Court for the Northern District of Georgia rendered no opinion in this case. The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported but is set out in the record at Pages 5, 6 and 7.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on April 22, 1960. Copy of the opinion and judgment are appended to this petition in the Appendix at Pages 5, 6 and 7. The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner was indicted and found guilty on a charge of wilfully failing and refusing to render a correct return of the disposition of 183 - 100 pound bags of sugar in violation of Sections 5213 and 5609 of Title 26 U. S. Code. The Circuit Court of Appeals affirmed the District Court's sentence on the ground that there was adequate evidence to support the jury verdict.

The sole question presented is:

Is the evidence in this case sufficient to show a disposition of the sugar involved so as to require the defendant to have made a return as provided in Title 26 Section 5213 U. S. Code.

STATUTES INVOLVED

The pertinent portions of Title 26 U. S. C. A. 5213 and Title 26 U. S. C. A. 5609 are set forth in the appendix at Pages 7 and 8.

STATEMENT

We will attempt to state only the facts which bear on the question presented. The evidence shows that investigators of the Alcohol and Tobacco Tax Division of the Treasury Department observed the petitioner leave a wholesale grocery establishment in Atlanta, Georgia with a tractor-trailer loaded with 300 - 100 pound bags of sugar, and followed the petitioner to Dawsonville, Georgia where he parked the trailer on property belonging to him and left it padlocked. The agents set up a twenty-four hour a day surveillance of the trailer which went on from June 14, 1958 until June 23, 1958. While watching this trailer the agents did not observe anyone remove any sugar from the trailer, but did observe the petitioner near the trailer during one night of the surveillance. On June 23, 1958 the agents secured a search warrant, opened the trailer and found that 183 - 100 pound bags had been removed therefrom. They also observed the grass and weeds between the trailer and a fence in the back yard of the petitioner's property broken and trodden upon, and also indications in the grass and weeds beyond said fence that a truck had been parked there. The position of the Government was that the defendant had removed the 183 - 100 pound bags of sugar and loaded them on a truck and removed them from the location, and that this amounted to a disposition of the sugar which required a return under the requirements of Title 26 Section 5213 U. S. C. A.

The Circuit Court of Appeals held that this was sufficient evidence to show such a disposition.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below should be reviewed because it has decided an important question of Federal law which has never been passed upon by this Court, and petitioner respectfully submits that the question is one of great importance in the administration of the Federal Tax laws as they relate to materials used in the manufacture of distilled spirits and is one of increasing importance to all persons who deal in such materials.

2. It is vitally important to the public generally to know definitely whether or not the mere removal from one place to another of materials used in the manufacture of distilled spirits will require them to make a return of such removal even though there has been actually no transfer of title of such materials to anyone.

3. The question presented by this case is one of great and increasing significance in the administration of the Federal Tax laws as it relates to such materials because of what, petitioner respectfully contends, is the over zealous administration of such laws by the agents of the Treasury Department.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

M. Neil Andrews

M. NEIL ANDREWS
610 Fulton National Bank Bldg.
Atlanta 3, Georgia

Counsel for Petitioner

APPENDIX TO PETITION FOR CERTIORARI

OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 18036

JAMES MALCOLM BEARDEN
Appellant

versus

UNITED STATES OF AMERICA
Appellee

Appeal from the United States District Court for the Northern District of Georgia

---

(April 22, 1960)

Before RIVES, Chief Judge, and HUTCHESON and BROWN, Circuit Judges

PER CURIAM: This appeal is from a judgment of conviction under a one count indictment charging the

defendant with wilfully failing and refusing to render a correct return of the disposition of 183 100-pound bags of sugar in violation of Sections 5213 and 5609, Title 26, U. S. Code. The main contention is that the defendant was entitled to a judgment of acquittal on the ground of insufficiency of the evidence. We think that there was adequate evidence to support the jury's verdict. We find no reversible error in the Court's charge. The judgment is.

AFFIRMED

Test: Edward W. Wadsworth
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGMENT

JAMES MALCOLM BEARDEN,

No. 18036

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

TITLE 26, SECTION 5213, U. S. C. A.:

"Section 5213. Return of materials used in the manufacture of distilled spirits.

(a) Requirement. — Every person disposing of any substance of the character used in the manufacture of distilled spirits shall, when required by the Secretary or his delegate, render a correct return, in such form and manner as the Secretary or his delegate may by regulations prescribe, showing the names and addresses

of the persons to whom such disposition was made, with such details, as to the quantity so disposed of or other information which the Secretary or his delegate may require as to each disposition, as will enable the Secretary or his delegate to determine whether all taxes due with respect to any distilled spirits manufactured from such substances have been paid. As used in this section —

(1) the term "distilled spirits" includes all products referred to in section 5002 (b); and

(2) the term "substance of the character used in the manufacture of distilled spirits" includes, but not by way of limitation, molasses, corn sugar, cane sugar, and malt sugar.

(b) Penalty.

For penalty for violation of subsection (a) see section 5609."

TITLE 26, SECTION 5609, U. S. C. A.:

"Section 5609. Penalty relating to return of materials used in the manufacture of distilled spirits.

Any person who wilfully violates any provision of section 5213 (a), or of any rules or regulations issued thereunder, and any officer, director, or agent of any such person who knowingly participates in such violation, shall upon conviction be fined not more than $500 or be imprisoned for not more than one year, or both.

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Office Supreme Court, U.S.
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No. 948

In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES MALCOLM BEARDEN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,

Department of Justice,
Washington 25, D. C.

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26 U.S.C. (1952 ed., Supp. V) 5609 2

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 948

JAMES MALCOLM BEARDEN, *Petitioner*

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UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 5-6; R. 86-87) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1960 (Pet. App. 7; R. 88). The petition for a writ of certiorari was filed on May 21, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to show that petitioner disposed of sugar for which he did not file a required return.

STATUTE INVOLVED

26 U.S.C. (1952 ed., Supp. V) 5213, 68A Stat. 639, provided:

> Every person disposing of any substance of the character used in the manufacture of distilled spirits shall, when required by the Secretary or his delegate, render a correct return, in such form and manner as the Secretary or his delegate may by regulations prescribe, showing the names and addresses of the persons to whom such disposition was made, with such details, as to the quantity so disposed of or other information which the Secretary or his delegate may require as to each such disposition, as will enable the Secretary or his delegate to determine whether all taxes due with respect to any distilled spirits manufactured from such substances have been paid. As used in this section—
>
> (1) the term "distilled spirits" includes all products referred to in section 5002(b); and
>
> (2) the term "substance of the character used in the manufacture of distilled spirits" includes, but not by way of limitation, molasses, corn sugar, cane sugar, and malt sugar.

* * * * * * * * *

STATEMENT

Petitioner was charged in a one-count indictment returned in the United States District Court for the Northern District of Georgia with wilfully failing and refusing to render a correct return as to the disposition of 183 100-pound bags of sugar in violation of 26 U.S.C. 5213 and 26 U.S.C. 5609 (R. 2). The jury found him guilty as charged (R. 75). He was sentenced to imprisonment for a period of twelve

months, but execution of the sentence was suspended and he was placed upon probation for a period of two years (R. 76-77). On appeal (R. 77-78), the conviction was affirmed (Pet. App. 5-6).

Petitioner was the purported operator of a grocery business in Dawson County, Georgia. He used a barn as a warehouse where he stocked sugar, rye meal, barley malt, yeast, and fruit jars, but no groceries or canned goods (R. 54-55). On September 1, 1955, petitioner was directed to submit to Howell, a delegate of the Secretary of the Treasury, returns showing dispositions of quantities of 100 pounds or more of sugar, these returns to be mailed or delivered not later than the business day following the date of disposition (R. 10-12; Gov. Ex. 1).

On June 13, 1958, federal agents of the Alcohol and Tobacco Tax Division observed petitioner's tractor-trailer being loaded with 100-pound bags of sugar at the platform of the Crystal Sugar Company in Atlanta, Georgia (R. 13). When questioned, petitioner showed a bill of sale from Crystal Sugar Company for 300 100-pound bags, and stated that he would place the sugar in his warehouse at Dawsonville, Georgia, for sale to local stores (R. 14, 17, 22). The agents followed the truck and saw that the trailer was left near a house occupied by one Roland on petitioner's land (R. 17-18, 37, 42-43, 49).

From June 14 to June 23, the agents had the trailer under surveillance, but did not see anyone remove sugar from it (R. 19, 29, 26, 44). On the night of June 16, while the agents were conducting their surveillance, petitioner fired a shot with his pistol. He told the agents he was tired of people coming around and making so much noise. When an agent

stated that some "legitimate merchant" might want his sugar, petitioner remarked that as long as the agents were watching, no one was going to pick up the sugar (R. 26-27). Petitioner did not answer a question as to where he kept his records (R. 19). On the night of June 21 two agents, with the aid of a flashlight, looked into the rear window of the trailer and saw only about 114 bags of sugar (R. 49).

On June 23, after a federal search warrant had been obtained, the agents entered the trailer and found 117 100-pound bags of sugar, *i.e.*, 183 of the original 300 were missing (R. 20-21, 29). None of the missing sugar was found in any of the other buildings on the premises (R. 21). The agents observed foot tracks from the rear of the trailer to a fence about forty yards away, and tire tracks from the other side of the fence to the public highway (R. 21, 30, 37, 39, 40).

Petitioner did not file a return showing the disposition of the 183 bags of sugar on any date between June 14 and June 23, 1958 (R. 51). Later he filed returns showing sugar sales on June 28, 29, and 30 to one Willie A. Shelton, Route 3, Dawsonville, Georgia (R. 15, 53, 59; Gov. Ex. 4). A federal agent attempted to find Shelton by contacting post office workers, the sheriff, the clerk of the court, and other Dawsonville residents, but was unable to locate anyone who knew him (R. 53-54). At a later date the agent asked petitioner where he could locate Shelton, but petitioner gave no answer to this question (R. 56). Petitioner told the agent that the officers had stolen the missing sugar. The agent testified that to his knowledge that was not true (R. 55-56).

ARGUMENT

Petitioner's sole contention is that there was insufficient evidence of a disposition of the missing 183 bags of sugar, so that he was not required to make a return as provided in 26 U.S.C. (1952 ed., Supp. V) 5213, *supra*, p. 2.

At petitioner's request, the judge charged that "disposition" as used in the indictment meant "a parting with the title of the property involved and not the mere removal of the same from his place of business" (R. 70). Thus, the jury, in convicting petitioner, necessarily found that title had been conveyed in the disposition of the sugar. This finding was supported by the evidence. The foot tracks, mashed grass, and tire marks in the vicinity of the parked trailer indicated that there had been activity in disposing of the sugar, which disappeared and was unaccounted for. The evidence, although circumstantial, was sufficient to show a disposition of the sugar and therefore to support the conviction. Cf. *United States* v. *Mu'tari*, 109 F. 2d 438, 440-441 (C.A. 7).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JUNE 1960.

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